(24)

FEB 1 1943
CHARLES ELMORE CROPLEY

No. 649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Margaret Mashunkashey, now Bradshaw, *Petitioner*,

vs.

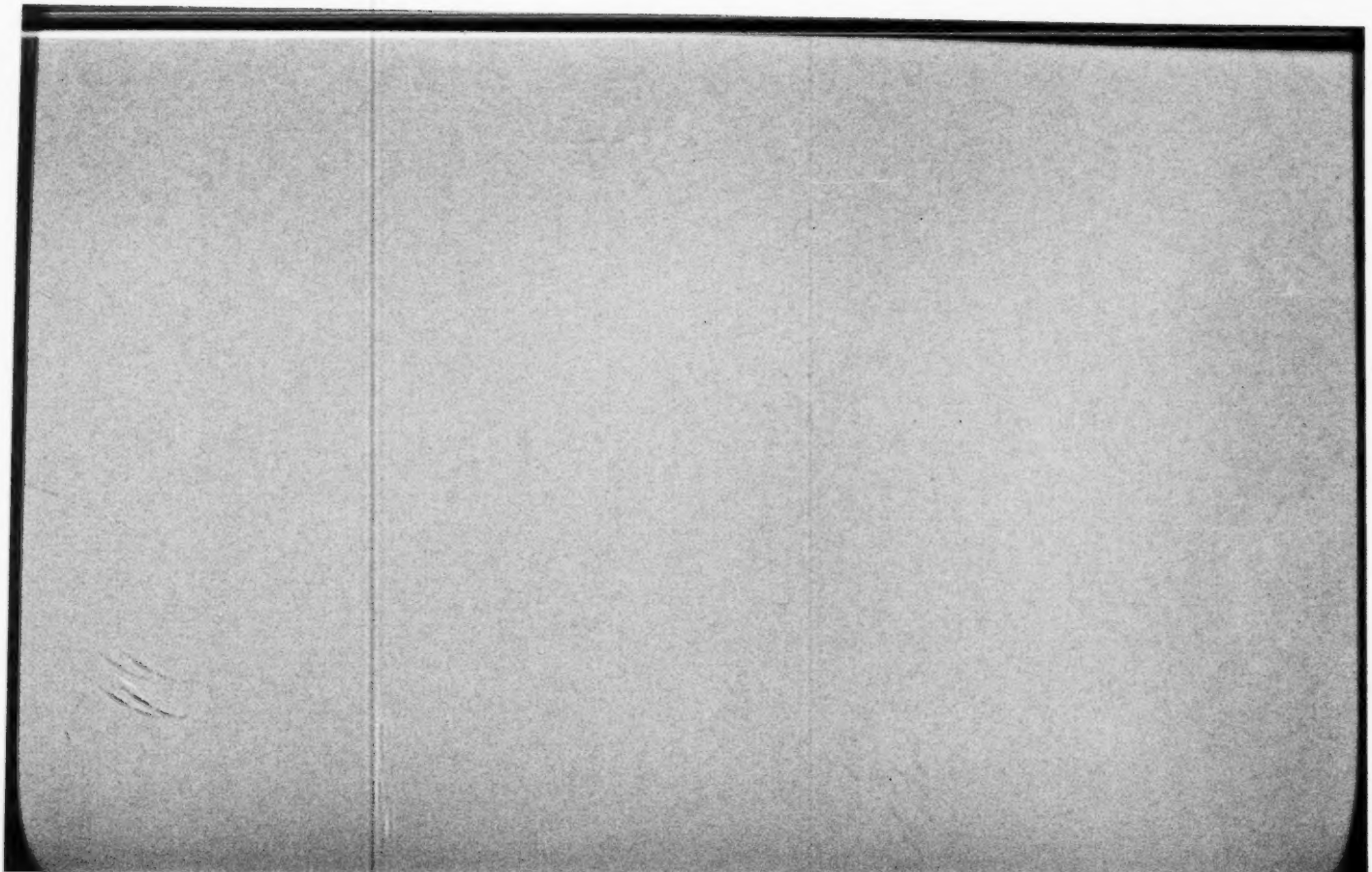
United States of America, A. G. Williams, Guardian of James G. Blaine, jr.; Mamie Mashunkashey, Executrix of the Estate of Ben Mashunkashey, Deceased; and L. M. Colville and John W. Keith, Joint Administrators of the Estate of Pah-pu-son-tas, Deceased. *Respondents.*

Brief of Respondents in Opposition to Petition for Writ of Certiorari

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

JOHN L. ARRINGTON
RALPH A. BARNEY
407-12 Triangle Building,
Pawhuska, Oklahoma,

Attorneys for Respondents A. G. Williams, guardian of James G. Blaine, Jr., Mamie Mashunkashey, executrix of the estate of Ben Mashunkashey, deceased, and L. M. Colville and John W. Keith joint administrators of the estate of Pah-pu-son-tas, deceased.



INDEX

Subject — Page

BRIEF OF NAMED RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ---- 1

I. Respondents Named ---- 1

II. Rule of Court ---- 1

III. Summary statement ---- 2

IV. Summary holding The Court of Appeals ---- 3

V. Argument Jurisdictional Question ---- 3

(1). Argument Petitioner based on false premise ---- 3
(2). Release ---- 4
(3). Vital concern to have adjudication rights of Indian wards ---- 5
(4). Petitioner's claim Indian blood another proceeding ---- 5
(5). Federal Court authority to determine validity of release ---- 6
(6). Rule same jurisdiction by authority of Government or because of diversity of citizenship ---- 8
(7). Estate did not vest in petitioner ---- 8
(8). Petitioner did not succeed to estate by will or by Indian blood ---- 9

VI. On the merits ---- 9

1. Petitioner's point No. III no place in this case ---- 10
2. Applicability and validity Sec. 7, Act. of Congress February 27, 1925 (43 Stat. L. 1008) decided ---- 10

CONCLUSION ---- 11

REFERENCE TO STATUTES

Construction of Act of Congress February 27, 1925 (43 Stat. L. 1008) by Comptroller General of the United States ---- 6 (A-15967)

Section 7 of Act of Congress of February 27, 1925 (43 Stat. L. 1008) ---- 10

TABLE OF CASES

Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867 ---- 8
Cramer v. United States, 261 U. S. 219, 67 L. Ed. 622 ---- 5
Eddy v. Eddy, 168 F. 590 ---- 6
Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101 ---- 8
Mashunkashey v. Mashunkashey, The Journal Oklahoma Vol. 13. No. 40 p. 1229, Oct. 3, 1942 (not officially reported) ---- 10
Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260 ---- 8
Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536 ---- 8
White House Lumber Co. v. Howard, 142 Okl. 163, 286 P. 327 ---- 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 649

Margaret Mashunkashey, now Bradshaw, *Petitioner,*

vs.

United States of America, A. G. Williams, Guardian of James G. Blaine, jr.; Mamie Mashunkashey, Executrix of the Estate of Ben Mashunkashey, Deceased; and L. M. Colville and John W. Keith, Joint Administrators of the Estate of Pah-pu-son-tsa, Deceased, *Respondents.*

BRIEF OF RESPONDENTS

To the Honorable, the Supreme Court of the United States:

The respondents A. G. Williams, guardian of James G. Blaine, Jr., Mamie Mashunkashey, executrix of the estate of Ben Mashunkashey, deceased, and L. M. Colville and John W. Keith, joint administrators of the estate of Pah-pu-son-tsa, deceased, respectfully object to the granting of the petition for writ of certiorari, and submit this brief in opposition thereto.

Rule of Court.

Section 5 of Rule 38 of the Rules adopted February 13, 1939.

"A review on a writ of certiorari is not a matter of

right, but of sound judicial discretion, *and will be granted only where there are special and important reasons therefore.*" There is no special or important reason therefor in this case.

Statement.

These respondents were permitted to intervene in the action as originally filed and were made parties thereto. (R. 47). The complaint (R. 9) recited in the beginning thereof that the action was brought and prosecuted "at the special direction of the attorney general of the United States of America and at the request of the Secretary of the Interior of the United States, for and on behalf of the United States and for and on the further behalf of Ben Mashunkashey, Osage allottee No. 457, Pah-pu-scn-tsa, Osage Allottee No. 520, and James G. Blaine, Jr., Osage Allottee No. 431. The complaint further alleged (R. 10) that the said Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine were restricted members of the Osage Tribe of Indians, and (R. 11) that during his lifetime Charles Mashunkashey (the decedent whose estate is involved in this case) was a full blood, restricted member of the Osage Tribe of Indians, and that the property of which he died seized was property held in trust by the United States and was restricted property. The fact as to the restricted status of Charles Mashunkashey and of his property was stipulated (R. 48), except for a modification as to certain purchased property.

The Decision Below.

The Court of Appeals (R. 104-109) held:

First. That the government not only has the power to institute actions to preserve the rights of its wards, but that it is its duty to do so when those rights are threatened.

Second. That the Federal District Court had the power to determine the validity and effect of the release given by petitioner.

Third. That the release referred to effected a complete settlement of all of petitioner's right, title and interest in and to the estate of the deceased.

Fourth. That petitioner's letter to her attorney clearly authorized him to settle her claim to the estate.

Argument.

There is but one question which relates itself to the propriety of the granting of certiorari in this case, as we view this matter. That question is, whether the United States District Court for the Northern District of Oklahoma had jurisdiction to render a declaratory judgment under the facts and circumstances related in the above statement. We believe this question is too well settled to require extensive argument or citation of authorities.

A great part of the argument of petitioner is based upon the false premise that upon the death of Charles Mashunkashey she inherited his property and the same thereupon became unrestricted. Petitioner has not been determined to

be an heir of Charles Mashunkashey. The property being restricted at the time of the death of Charles Mashunkashey, the same was under the control of the Secretary of the Interior, and it was his duty to see that the rights of the wards of the government, Osage Indian heirs of Charles Mashunkashey, were protected. It is quite true that Oklahoma state courts alone have the power to determine who the heirs of Charls Mashunkashey are, but pending such final determination the federal government has the right and the duty, on behalf of its Indian wards, to protect the estate against one with whom it has dealt in effecting a settlement of such person's claim in and to the estate.

Assuming, however, for the purpose of argument only, that petitioner, but for the release of her claim, would ultimately be determined to be an heir to said estate, until such determination there is no passing of title and the property of the estate remains in the custody and under the control of the Secretary of the Interior.. In *White House Lumber Co. v. v. Howard,* 142 Okl. 163, 286 P. 327, the Supreme Court of Oklahoma said:

> "The right of an heir to real estate in this state of an intestate is governed by the law of this state (section 8400, C. O. S. 1921), and is acquired by succession as provided by the law of this state (section 8552, C. O. S. 1921.) The probate procedure of the state controls the manner of passing of the title to the real estate, and the heir is dependent for his title, not only upon the statutes of succession (article 4, c. 93, C. O. S. 1921), but upon the probate procedure for the determination and distribution thereof."

If, moreover, as the government contends in this case, the petitioner released whatever right in and to said estate that she may have had, it was of vital concern to the government to see that the validity of such release was properly adjudicated and determined so that the rights of its Indian wards would be properly protected and conserved, particularly in view of the fact that the state courts were refusing to assume jurisdiction to pass upon the question of the validity of the release.

In *Cramer v. United States*, 261 U. S. 219, 67 L. ed. 622, 627, this court said:

> "The contention that the United States was without authority to maintain the suit in the capacity of guardian for these Indians is without merit. In United States v. Kagama, 118 U. S. 375, 383, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109, the general doctrine was laid down by this court that the Indian tribes are wards of the nation, — communities dependent on the United States. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and, with it, the power.' This duty of protection and power extends to individual Indians, even though they may have become citizens."

While the question of heirship is not before this court, it should be noted that petitioner has been claiming to be of Indian blood and therefore not precluded from inheriting in the estate of the deceased, although in this proceeding she is now contending that Section 7 of the Act of Congress approved February 27, 1925, (43 Stat. L. 1008), which pro-

hibits all persons not of Indian blood from inheriting from Osage Indians of one-half or more Indian blood, is invalid. Construing the effect of this statute the Comptroller General of the United States, on November 2, 1926, said (A-15967):

> "While this provision is primarily for the consideration of the local court in which the heirship is determined, the Secretary of the Interior in his administration of the affairs of the Osage Indians, should see that this section is taken into consideration by the court in the determination of the proper heirs in any given case, so that payment of any funds in the treasury of the United States to the credit of a deceased Indian shall be made only to persons properly entitled thereto under the law."

The authority of the Federal court in this case to construe and determine the validity of the release given by the petitioner is well supported by the case of Eddy v. Eddy, 168 F. 590. In that case the complainant "sought the rescission of an instrument in which she had signified her acceptance of the provisions made in her behalf by the last will and testament of her deceased husband, Charles K. Eddy, and released all other claims against his estate," alleging that the release was obtained by fraud and undue influence. In passing upon the authority of the Federal court to determine the validity of the release in that proceeding the Circuit Court of Appeals for the Sixth Circuit said:

> "It is undoubtedly true that, when the matter in controversy is one within the exclusive jurisdiction of the probate court, the courts of the United States will not assume jurisdiction. They will not take cognizance of

the purely administrative proceedings in the settlement of estates of deceased persons. Nor will they invade the possession of the assets taken by those courts for the purposes of administration. But when a citizen of one state has a claim upon the estate of a deceased person situated in another state, or a matter of controversy with a citizen of such other state who represents, or has an interest in, the estate, and whether such claim be of a legal or equitable nature, he has a right under the Constitution and laws of the United States to come into its courts for a remedy, and of this right he cannot be deprived by any law of the state. Such a right is a matter in controversy in the case before us. It is not necessary to its determination that the court should take the possession of any property out of the hands of the probate court. The complainant seeks the rescission of an instrument which she says these defendants have unjustly and by inequitable means obtained from her and the use of which will harm her in the probate court. That court has not plenary equitable jurisdiction whereby it could give her relief; and, if it had, that would not exclude the jurisdiction of the federal court. It would simply establish it as a court of co-ordinate authority with the federal court, and the complainant, being a citizen of another state, would still have the right to go into the federal court for relief. The right and power to determine the controversy between the parties rested in the Circuit Court of the United States, and it could proceed to that extremity without exciting any conflict with the probate court. When that is done, the claim is presented to the probate court as one adjudicated, and upon the footing of the adjudication the court will respect it in ordering the disposition of the assets of the estate. Thus the rights of all the parties are in due form of law, and, without the invasion of the province of any court, enforced. This outline of the respective provinces of the federal courts and the probate courts of the states

> is deduced from a number of decisions of the Supreme Court, among which we may refer to: Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Farrell v.O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. This contention of the appellees must therefore be overruled."

It can make no difference that jurisdiction in that case was because of diversity of citizenship. The same rule would apply where jurisdiction results from the right and duty of the government to maintain actions in the federal courts for and on behalf of its Indian wards.

At page 19 of her petition for writ of certiorari petitioner states that:

> "The funds in possession of the government and other personal property that vested in petitioner were unrestricted."

This unqualified position that the estate vested in her upon the death of Charles Mashunkashey is the foundation of petitioner's entire argument. Aside from the point already mentioned, that she was dependent for her title upon probate procedure, petitioner could succeed to the estate of Charles Mashunkashey in one of three ways: (1) under the will of the decedent; (2) by proof of her being of Indian blood, and hence not prohibited from inheriting by section 7 of the Act of Congress approved February 27, 1925; or (3) by establishing the invalidity of said section 7.

The will of Charles Mashunkashey has been disapproved by the Secretary of the Interior, and is therefore ineffective

to pass title to petitioner. She has been determined not to be of Indian blood by the District Court of Tulsa County, Oklahoma (see footnote 3 to opinion of Circuit Court of Appeals, R. 106). That judgment has now been affirmed by the Supreme Court of Oklahoma. *The Journal, Vol. 13, No.* 40, p. 1229, of October 3, 1942.

It thus appears not only that petitioner did not succeed to the estate of Charles Mashunkashey either by will or by reason of her Indian blood, but that whatever claim she had in or to the estate was built upon the sand. It was this nebulous claim which she was paid $15,000 for releasing, and she is in poor position now to make the bold contention that the entire estate passed to her as unrestricted property.

Merits.

Here, again, petitioner bases her point No. II upon the premise that she had title to the estate of Charles Mashunkashey, deceased, and from that premise argues that a formal conveyance would be necessary to divest her of such title. We have called attention above to the case of *White House Lumber Co. v. Howard*, in which it was held that title of an heir to real estate is dependent upon probate procedure. If the probate court, prior to the giving of the release in question, had determined that petitioner was an heir to the estate and had by its decree vested the property in her and that judgment had become final, then petitioner's position would be sound. But as the matter stood at the time the release was given, petitioner had at best only a claim of heirship, and the judgment of the state district court and the decision of the

Oklahoma Supreme Court show that her claim, wholly independently of the release, was without foundation.

We have no fault to find with the cases cited under this point in the brief of petitioner, but no case is cited, and we believe none can be found, holding ineffective a release such as that given by petitioner.

As to petitioner's point No. III, relating to the applicability and validity of section 7 of the Act of Congress of February 27, 1925 (43 Stat. 1008), we believe these questions have no proper place in this case. The issue before the District Court was the validity of the release, and its validity or invalidity was in no way dependent upon the applicability or validity of the section referred to.

Furthermore, both the applicability and the validity of said section 7 was in issue in the probate proceedings in the estate of Charles Mashunkashey, and in the case styled *Masunkashey v. Mashunkashey*, above referred to as found in *The Journal*, Vol. 13, No. 40, p. 1229, the Supreme Court of Oklahoma said in the syllabus:

> "1. Under the provisions of section 1 of the Enabling Act (34 Stat. 267), the power to legislate with respect to the devolution of Indian lands and property was reserved to the federal government.
>
> "2. Section 7 of the Act of Congress of February 27, 1925, limiting the right to inherit the property of Osage Indians of one-half or more Indian blood to heirs of Indian blood, is a valid exercise of the legislative powers of the Congress.

"3. Where there is conflict between state law and federal legislation, which is within the exclusive sphere of federal authority, the state law is superseded.

"4. Section 7, supra, applies to the restricted lands moneys, and mineral interests of individual Osage Indians.

"5. Record examined, and held, that the finding of the trial court that the surviving wife of decedent is not of Indian blood is not contrary to the clear weight of the evidence."

At page 24 of her brief petitioner says that "steps are now being taken to have said decision reviewed by this court." Whether or not that decision should be reviewed is not for present consideration, but certainly the applicability or validity of section 7 has nothing to do with the questions now before the court in this case.

We believe that no good reason for granting certiorari in this case has been shown, and that the petition therefor should be denied.

Respectfully submitted,

JOHN L. ARRINGTON
RALPH A. BARNEY
Attorneys for Respondents A. G. Williams, guardian of James G. Blaine, Jr., Mamie Mashunkashey, executrix of the estate of Ben Mashunkashey, deceased, and L. M. Colville and John W. Keith, joint administrators of the estate of Pah-pu-son-tsa, deceased.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Caesar v. *Burgess*, 103 F. 2d 503	8
Cramer v. *United States*, 261 U. S. 219	7
Heckman v. *United States*, 224 U. S. 413	7
In re Martin's Estate, 183 Okla. 177	8
In re Smith's Estate, 188 Okla. 158	8
In re Thompson's Estate, 179 Okla. 240, certiorari denied, 302 U. S. 718	8, 9
Jefferson v. *Fink*, 247 U. S. 288	8
McCurdy v. *United States*, 246 U. S. 263	7
Morrow v. *United States*, 243 Fed. 854	7
Scott v. *Beams*, 122 F. 2d 777, certiorari denied, 315 U. S. 809	9
Strickland v. *Peters*, 120 F. 2d 53	8
Taylor v. *Tayrien*, 51 F. 2d 884, certiorari denied, 284 U. S. 672	8
United States v. *Minnesota*, 270 U. S. 181	7
United States v. *Osage County*, 251 U. S. 128	8
United States v. *Pumphrey*, 11 App. D. C. 44	7
Vinson v. *Cook*, 76 Okla. 46	10
Washington v. *Miller*, 235 U. S. 422	8
White House Lumber Co. v. *Howard*, 142 Okla. 163	9

Statutes:

Act of June 28, 1906, sec. 6, 34 Stat. 539	9
Act of April 18, 1912, 37 Stat. 86:	
Sec. 3	9
Sec. 8	3
Act of February 27, 1925, sec. 7, 43 Stat. 1008	8

Miscellaneous:

Note 6 A. L. R. 555 (1919)	10
38 A. L. R. 759 (1920)	10
54 A. L. R. 976 (1927)	10

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 649

MARGARET MASHUNKASHEY, NOW BRADSHAW,
PETITIONER

v.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. Its journal entry of judgment appears at R. 39–42. The opinion of the Circuit Court of Appeals (R. 104–109) is reported in 131 F. 2d 288.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 16, 1942 (R. 109). A petition for rehearing, filed November 21, 1942,

was denied December 9, 1942 (R. 127). The petition for a writ of certiorari was filed January 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may maintain an action on its own behalf, and on behalf of certain restricted Osage Indians, who are claimants to the estate of another restricted Osage Indian, to obtain a declaratory judgment as to the validity and effect of a release by his widow of all claims against the estate.

2. Whether petitioner's attorney was authorized to release her claims in and to her husband's estate.

3. Whether the release executed by petitioner's attorney on her behalf released all her claims in and to her husband's estate.

STATEMENT

This action was instituted by the United States on its own behalf and on behalf of certain full-blood, restricted Osage Indians against Margaret Mashunkashey, now Bradshaw (hereinafter referred to as petitioner), and was brought for the purpose of obtaining a declaratory judgment as to the validity and effect of a release dated March 31, 1938, executed on behalf of petitioner by Inghram D. Hook, her attorney. The relevant facts may be summarized as follows:

Charles Mashunkashey, a full-blood, restricted Osage Indian, died on June 10, 1934 (R. 49). He was survived by his widow (the petitioner) and the Indian claimants (R. 49). The property of the decedent was restricted (R. 48). He left a will, under the terms of which (R. 101) his widow was to receive all his property with the exception of a small bequest to his half-brother, one of the claimants. Under Section 8 of the Act of April 18, 1912, 37 Stat. 86, the validity of this will was contingent upon its approval by the Secretary of the Interior, and petitioner, on May 16, 1936, entered into a written contract with Inghram D. Hook, an attorney, to represent her "in connection with the contest over the will" (Ex. "A" attached to complaint, R. 37; R. 91). On June 14, 1937, the Secretary of the Interior disapproved the will (R. 49).

On April 1, 1938, Hook filed a petition for rehearing before the Secretary of the Interior (R. 49) and during the pendency of this rehearing negotiations were entered into between counsel for the Indian claimants, on the one hand, and Inghram D. Hook, representing the petitioner, on the other, for the purpose of settling any claims that petitioner might have (R. 53, 71–73). The attorney for the petitioner was willing that his client (for a consideration of $15,000.00) should release any possible claim "in or to the estate of Charles Mashunkashey, * * * either by reason of his will or by reason of being his wife," and should

state that she was not of Indian blood and would make no claim to the estate on that ground (tentative release, Ex. IV–F, R. 59–60). The attorneys for the other claimants wanted petitioner also to release her right to administer the estate (R. 56–57).

On March 22, 1938, petitioner specifically authorized her attorney "to settle my claim in and to the above entitled estate for the sum of $15,000.00" and "to say to the Interior Department that I will not make any claim to be general administrator" (Govt. Ex. 1, R. 50).[1]

On March 31, 1938, as a result of a conference between interested counsel and officials of the Interior Department, the final release here involved (Govt. Ex. "A", R. 16)[2] was drafted. The instrument provides that petitioner "hereby releases, discharges and acquits the estate of the said Charles Mashunkashey from any and all claims which she may have against said estate by reason of being the widow of Charles Mashunkashey, or for any other reason or cause whatsoever, and she relinquishes and releases any claim she may have to be the general administratrix or to name or designate the general administrator of said estate for and in consideration of the payment of

[1] Referred to as "Exhibit 3 or III" in the testimony of William H. Flanery, R. 66–70, and Nathan R. Margold, R. 71–77.

[2] Referred to as "Exhibit 2 or II" in the testimony of William H. Flanery, R. 66–70, and Nathan R. Margold, R. 71–77.

the said $15,000". The release was signed by Hook as attorney for petitioner on March 31, 1938, and by the other claimants and their counsel on April 4, 1938. It was approved by the Assistant Secretary of the Interior on April 12, 1938 (R. 17), on which date he reaffirmed his disapproval of the will (R. 63).

Administration on the estate of Charles Mashunkashey was then sought in the County Court of Tulsa County, Oklahoma, and administrators were appointed. On May 17, 1938, Hook filed an application in the county court in which he stated that petitioner had released "all her rights, claims, and interest in the estate" for $15,000, and requested an order directing payment of that amount "to Margaret Mashunkashey and her attorney of record, Inghram D. Hook" (R. 89–90). The court granted the application (R. 90). On June 6, 1938, after the Assistant Secretary of the Interior had authorized the Superintendent of the Osage Agency at Pawhuska, Oklahoma, to pay the administrators $15,000 out of the restricted funds of Charles Mashunkashey (R. 65), a check in that amount was drawn by the administrators to the order of petitioner and her attorney, Inghram D. Hook (R. 27). Two or three days later, petitioner and her attorney endorsed this check and received the money therefor (R. 94–95).

On December 12, 1938, petitioner, by a different attorney, intervened in the administration pro-

ceedings in the County Court of Tulsa County claiming that she was the sole heir of decedent by virtue of being his surviving wife (R. 13, 34). The other claimants filed their answers setting up the release executed by petitioner, and also denied that she was of Indian blood. The county court, at the instance of petitioner, held that it had no jurisdiction to construe the release, and entered judgment declaring petitioner to be an heir (R. 13, 14, 35, 36). On appeal by the other claimants, the District Court of Tulsa County, after argument, indicated that it was likewise of the opinion that the county court was without jurisdiction to construe the release (R. 14, 15, 36).[3]

The instant proceeding was then instituted by the United States, seeking a declaratory judgment in the federal district court as to the interpretation of the release. The other claimants intervened and adopted the petition of the United States (R. 47). The district court entered judgment declaring that petitioner by the release had relinquished all her rights in the estate of the deceased (R. 39–42). On appeal by the petitioner, the Circuit Court of Appeals affirmed the judgment (R. 109).

---

[3] Since the institution of the instant case, the District Court of Tulsa County has rendered a judgment, holding it had no jurisdiction to construe the release but determining that petitioner herein was not of Indian blood and therefore was not an heir. On appeal, the Supreme Court of Oklahoma affirmed this judgment. *Mashunkashey* v. *Mashenkashey*, decided September 29, 1942, not yet reported.

ARGUMENT

1. Petitioner's principal contention is that the property involved in this controversy is not restricted property and that therefore the United States has no right to maintain this action on behalf of its Indian wards.

The court below ruled correctly in rejecting that argument. Decedent's property was restricted (R. 48). The claimants on whose behalf the United States sues, are full blood restricted Osage Indians (R. 48). Petitioner in the County Court of Tulsa County, Oklahoma, had asserted rights in the estate which were adverse to the interests of those Indians. The validity of her claim depended upon the interpretation of the release which the state courts held they had no jurisdiction to construe. That the United States, by reason of its relationship to restricted Indians, has the power to institute actions to preserve their rights has been repeatedly decided by this Court.[4] *Heckman* v. *United States,* 224 U. S. 413; *United States* v. *Minnesota,* 270 U. S. 181, 194; *Cramer* v. *United States,* 261 U. S. 219. Having this power, the United States properly invoked the jurisdiction of the federal district court to determine the

[4] The position of petitioner that such suits cannot be instituted unless restricted property is involved is unsound. The courts have taken jurisdiction of many such suits. E. g. *McCurdy* v. *United States,* 246 U. S. 263; *Morrow* v. *United States,* 243 Fed. 854 (C. C. A. 8); cf. *United States* v. *Pumphrey,* 11 App. D. C. 44 (1897).

validity and effect of the release, regardless of what rights devolved upon petitioner. *Strickland* v. *Peters,* 120 F. 2d 53 (C. C. A. 5); cf. *Caesar* v. *Burgess,* 103 F. 2d 503, 506 (C. C. A. 10).

Moreover, it is clear that title to the property did not automatically devolve upon petitioner thereby removing the restrictions upon it. Section 7 of the Act of February 27, 1925, 43 Stat. 1008, provides that "none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe".[5] This statute covers individual estates. *In re Martin's Estate,* 183 Okla. 177, 182; cf. *Taylor* v. *Tayrien,* 51 F. (2d) 884, 889 (C. C. A. 10), certiorari denied, 284 U. S. 672; *Washington* v. *Miller,* 235 U. S. 422, 427; see also *In re Thompson's Estate,* 179 Okla. 240, 243, certiorari denied, 302 U. S. 718; *In re Smith's Estate,* 188 Okla. 158, 162. And it has been adjudicated in the probate proceedings of this very estate that petitioner is not of Indian blood (see p. 6, n. 3, supra). Consequently, it would seem plain that she took no interest in the estate.[5]

[5] Although Congress had previously prescribed a different rule for the devolution of the property of Osage Indians, there can be no question of its power to make changes in respect of any estates not passed to the heir before enactment of the law. *United States* v. *Osage County,* 251 U. S. 128, 132; *In re Smith's Estate,* 188 Okla. 158, 161; *Jefferson* v. *Fink,* 247 U. S. 288, 294; cf. *Taylor* v. *Tayrien,* 51 F. (2d) 884, 889 (C. C. A. 10), certiorari denied, 284 U. S. 672.

But it is unnecessary to rest upon Section 7 or to pass upon its meaning or validity. Even if Section 7 did not apply, or if it were invalid, as petitioner contends, nevertheless petitioner acquired no title to the estate. Section 7 aside, the property of a deceased Osage passes according to the laws of Oklahoma [6] and by Oklahoma law an heir is dependent for his title upon probate proceedings adjudicating him to be the owner. *White House Lumber Co.* v. *Howard,* 142 Okla. 163, 165. When the release was executed, petitioner had not been adjudicated an heir. Consequently, she was in no better position than any other claimant to the estate and, of course, could contract to release her claim to it. *Scott* v. *Beams,* 122 F. 2d 777, 786 (C. C. A. 10), certiorari denied, 315 U. S. 809;

---

[6] Section 6 of the Act of June 28, 1906, 34 Stat. 539, provides:

> That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

And Section 3 of the Act of April 18, 1912, 37 Stat. 86, gave the county courts of Oklahoma jurisdiction as probate courts over estates of deceased Osage Indians. As an incident to that jurisdiction the county court may determine heirs. *In re Thompson's Estate*, 179 Okla. 240, 242 (1937), certiorari denied, 302 U. S. 718.

Vinson v. *Cook,* 76 Okla. 46 (1919). See note 6 A. L. R. 555 (1919); 38 A. L. R. 759 (1920); 54 A. L. R. 976 (1927).

2. There is nothing requiring review by this Court of petitioner's contentions (Pet. 22–23) that her attorney, Hook, was not empowered to execute a release of her interest as an heir of the estate, and that the "release" signed on her behalf by Hook was insufficient to effect a complete settlement of all of petitioner's right, title, and interest in and to the estate of the deceased. On both points the decision below is plainly correct for reasons stated in the opinion.

CONCLUSION

The decision of the circuit court of appeals is right. It raises no question of general importance or conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
VERNON L. WILKINSON,
DWIGHT D. DOTY.

FEBRUARY, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943